

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

WILSON PADILLA-MORALES,

Plaintiff,

v.

THE SHELL COMPANY (PUERTO
RICO), et al.,

Defendants.

Civil No. 04-2276(JAF)

O R D E R

A hearing for a Petroleum Marketing Practices Act ("PMPA") injunction, requiring Wilson Padilla to surrender his Luquillo Select Shell gasoline station and convenience store to Shell, was held on October 20, 2005. See Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806.

Having heard the evidence, and having made the corresponding credibility assessments, the court finds as follows:

1. There is no question that Wilson Padilla is a controversial franchisee who signed a franchise agreement and later sued Shell reneging on a number of franchise terms and conditions over the financial supervision by Shell of the franchise agreement. Padilla claims that certain provisions in the franchise agreement are in conflict with Puerto Rico law, 23 L.P.R.A. §§ 1101-1135.

2. In addition to suing Shell on the franchise contract, Padilla claimed the benefit of arbitration under the franchise agreement. This was denied by Shell.

1 3. While the legal dispute outlined above was in progress,
2 Padilla had trouble of sorts paying Shell for the gasoline and
3 related products. Typically, gasoline is delivered to franchisees
4 payable cash on delivery ("COD"). Shell's rule is that if the tank
5 truck arrives at the gas station to deliver fuel and the payment is
6 not available, delivery is not made.

7 In this case, however, Shell extended credit to Padilla by
8 giving him the opportunity of getting one tank-truck delivery on
9 credit. Upon receiving the next delivery, Padilla would pay for the
10 previous one. This arrangement is known as a load-to-load delivery
11 basis.

12 In addition, other rules regarding payment apply. For example,
13 COD deliveries cannot be paid in cash currency. Payment by check is
14 the only option. However, if a franchisee fails to honor a check
15 because of lack of sufficient funds, then Shell places the franchisee
16 on a "hard-cash basis," requiring payment by certified or manager's
17 check.

18 Padilla was placed on a "hard-cash basis" on two occasions, in
19 October 2003 and in May 2004. In October 2003, Shell granted Padilla
20 a payment plan for the payment of a \$13,290.20 debt in three equal
21 payments of \$4,430.07. Padilla fully paid this balance.

22 In May 2004, Padilla was once again placed on a "hard-cash
23 basis." It so happened that on May 3, 2004, Padilla received
24 gasoline amounting to \$16,330.50. He paid it by check upon receiving

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1 the next load on May 10 (load-to-load delivery basis). The check
2 issued by Padilla bounced for lack of funds. By May 17, 2004, an
3 additional gasoline delivery was made. Padilla paid for the previous
4 May 10 delivery. Two invoices remained outstanding: The May 3 and
5 May 17 deliveries.

6 A Shell representative spoke to Padilla. He was placed on
7 "hard-cash basis." No additional product would be delivered after
8 May 17 unless he paid all outstanding Shell invoices, amounting to
9 approximately \$35,000.

10 On May 21, 2004, a collection letter was delivered. Padilla
11 promised to pay in full. Padilla secured manager's checks amounting
12 to the \$35,000 due and owing, represented this information to Shell,
13 and ordered an additional delivery of the product. Delivery was
14 promised for June 2, 2004. No deliveries were made earlier because
15 of the long Memorial Day weekend. By May 27, the station ran out of
16 gasoline.

17 On June 1, 2004, a termination letter was served on Padilla,
18 requesting rescission of the franchise agreement based on three
19 grounds: (a) the gasoline station ran out of gas; (b) lack of
20 payment; and (c) failure to comply with contractual obligations.

21 4. The court finds that, had it not been for Padilla's January
22 2004 lawsuit against Shell, the gasoline delivery of June 2, 2004
23 would have taken place and the \$35,000 payment would have been
24 received, putting an end to the immediate payment dispute. The court
25 also finds that the incident leading to Padilla being placed on a

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1 "hard-cash basis" on May 21, 2004 would not have resulted in
2 termination had it not been for the Padilla lawsuit.

3 5. Under the circumstances, the court finds that Shell should
4 not be given the benefit of injunctive relief under PMPA. The
5 termination was motivated mainly by the Padilla lawsuit over the
6 validity of terms and conditions in the franchise agreement. The
7 failure to timely pay for the product was the excuse Shell needed to
8 terminate without having to arbitrate the Padilla claims over the
9 validity of contract terms and conditions. It is clear from this
10 record that as late as May 21, 2004, Shell had offered a payment
11 alternative which Padilla was ready to meet. It is also clear that
12 after Padilla informed he had secured manager's checks to pay in
13 full, the product was promised and not delivered, in order to force
14 Padilla to run out of gas, closing the station for sales of this
15 primary product, thus creating a second cause for termination. The
16 court also finds that Shell's promise to accept payment in full upon
17 the June 2 promised delivery was a well-planned maneuver to force
18 termination. In this sense, Shell will not be given injunctive
19 relief against Padilla under PMPA at this time. The court will not
20 order Padilla to surrender the gas station until this controversy is
21 fully arbitrated as required by the franchise agreement.

22 6. The parties will submit proposals for mediation and/or
23 arbitration **within ten (10) days** as required by the agreement. In
24 the event that the parties fail to promptly act, the court will
25 appoint a mediator/arbitrator pursuant to the Federal Arbitration
26 Act. The court will order mediation/arbitration to be concluded in

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1 sixty (60) days. All issues are open to arbitration, including
2 Padilla's claim of null and void contract dispositions, as well as
3 Shell's claims involving their right to terminate the contractual
4 relationship.

5 The court retains jurisdiction to enforce any arbitration award.

6 **IT IS SO ORDERED.**

7 San Juan, Puerto Rico, this 25th day of October, 2005.

8 S/José Antonio Fusté
9 JOSE ANTONIO FUSTE
10 Chief U. S. District Judge